No. 79-307

In the Supreme Court of the United States

OCTOBER TERM, 1979

JACK MOODY STRICKLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-35a) is reported at 591 F. 2d 1112. The memorandum order of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. A petition for rehearing was denied on June 22, 1979 (Pet. App. 36a). The petition for a writ of certiorari was filed on August 25, 1979, and is therefore out of time under Rule 22(2) of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner has a right to a pretrial appeal from an order denying his

motion to dismiss certain counts of an indictment on the ground that they charge the same offenses as an indictment that had earlier been dismissed in another district on speedy trial grounds.

STATEMENT

1. In August 1973, an indictment was returned against petitioner in the Middle District of Tennessee. It charged him with possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a), and with conspiracy to commit that offense, in violation of 21 U.S.C. 846.[1] The indictment further charged that the conspiracy continued from December 1970 to the date of the return of the indictment. The bill of particulars stated that overt acts in furtherance of the conspiracy occured in Tennessee, Georgia, Canada, Kentucky, Florida, Arizona and El Paso, Texas (Pet. App. 9a-10a). On March 18, 1975, the district court dismissed this indictment with prejudice for failure to grant petitioner a speedy trial (Pet. App. 13a).

In August 1974, a second indictment was returned by a grand jury in the District of New Mexico. This indictment charged petitioner with possession of marijuana with intent to distribute and conspiracy to commit that offense in New Mexico on or about August 18, 1974, in violation of 21 U.S.C. 841 and 18 U.S.C. 2 (Pet. App. 10a). Petitioner was tried and convicted on both counts of this indictment on March 14, 1975, and sentenced to five years' imprisonment (Pet. App. 13a).[2]

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[1]Acts occurring prior to May 1, 1971, were alleged to violate 21 U.S.C. 176(a) (repealed), the predecessor of the current 21 U.S.C. 841 and 846.

[2]The Tenth Circuit affirmed this conviction, 534 F. 2d 1386, cert. denied, 429 U.S. 831 (1976).

The Texas indictment that is involved in this case was returned by a grand jury in the Western District of Texas in June 1977. It charged petitioner with: (1) importing marijuana in violation of 21 U.S.C. 952(a) and 960(a)(1); (2) conspiring to import marijuana in violation of 21 U.S.C. 952(a) and 963; (3) aiding and abetting two individuals on three occasions in their unlawful possession of marijuana in violation of 21 U.S.C. 841(a), thus violating 18 U.S.C. 2; (4) conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846; and (5) conducting a continuing criminal enterprise in illicit drugs in violation of 21 U.S.C. 848 (Pet. App. 11a).

Both the importation conspiracy and the possession conspiracy in this indictment were alleged to have continued from September 1971 to June 1976 in Tennessee, Georgia, New Mexico, Mexico and the Western District of Texas. The indictment listed 14 overt acts in furtherance of the importation conspiracy and repeated 12 of these acts as the overt acts in furtherance of the possession conspiracy. These overt acts were alleged to have occurred between September 1971 and November 1973 in New Mexico, Mexico and the Western District of Texas. The criminal enterprise was alleged to have operated from June 1972 to June 1976 in Mexico, New Mexico, Georgia, Minnesota, North Carolina, the District of Columbia, and the Western District of Texas (Pet. App. 11a-12a).

2. In August 1977, petitioner moved to dismiss the Texas indictment on the ground that he had previously been placed in jeopardy on the charges by the New Mexico and Tennessee indictments. The district court held a pretrial double jeopardy hearing on August 31, 1977 (Pet. App. 14a). On September 15, 1977, a superseding indictment was filed that charged essentially

the same offenses as the first indictment but omitted five co-conspirators and the reference to Tennessee as one location for the conspiracies. Five overt acts were also omitted from each of the conspiracy counts, shortening the period of the overt acts in furtherance of the importation conspiracy to December 1971 through November 1972 and the period of the overt acts in furtherance of the possession conspiracy to December 1971 through October 1972 (Pet. App. 12a-14a).

In September 1977, the district court entered an order (Pet. App. 1a-7a) denying petitioner's motion to dismiss the Texas indictment on double jeopardy grounds. The court ruled (Pet. App. 1a) that the substantive counts of importing marijuana and aiding and abetting the possession of marijuana with intent to distribute were not barred because they were based on distinct acts occurring in the Western District of Texas. The district court also ruled (Pet. App. 2a) that the conspiracies alleged in the superseding indictment were distinct and separate from the ones alleged in the Tennessee and New Mexico indictments and that the Tennessee indictment had not placed petitioner in jeopardy because it was dismissed before jeopardy had attached (Pet. App. 2a). Finally, the court found (Pet. App. 3a-4a) that the government, despite due diligence, had not discovered that petitioner could have been charged with conducting a criminal enterprise at the time the Tennessee and New Mexico indictments were filed. Consequently, the court ruled that the previous indictments did not bar a criminal enterprise prosecution, citing *Jeffers* v. *United States*, 432 U.S. 137 (1977).

3. Petitioner appealed the district court's pretrial denial of his motion to dismiss on double jeopardy grounds. The court of appeals held that the conviction under the New

Mexico indictment did not bar prosecution for the substantive counts of importation and aiding and abetting the possession of marijuana with intent to distribute because those counts "allege separate offenses" (Pet. App. 29a). The court further held (Pet. App. 28a) that the Texas indictment charging conspiracy to import marijuana was not barred because conspiracy to import and conspiracy to possess with intent to distribute (the only conspiracy charged in the New Mexico indictment) are separate offenses for double jeopardy purposes. The court did find, however, that petitioner had made a non-frivolous prima facie claim of double jeopardy, based on the New Mexico indictment, with respect to certain portions of the possession conspiracy and criminal enterprise charges (Pet. App. 27a, 32a-33a). It therefore remanded the case to the district court for further proceedings at which the government would have the burden of showing that those aspects of the intended prosecution are not barred by the Double Jeopardy Clause (Pet. App. 33a-34a).

The court of appeals rejected petitioner's double jeopardy claim to the extent it was based on the Tennessee indictment, holding that the Tennessee charges had been dismissed before jeopardy had attached (Pet. App. 21a-22a). Rather, the court noted, it was petitioner's Sixth Amendment right to a speedy trial that protected him against the government once again bringing the charges contained in the Tennessee indictment. The court declined to consider the merits of this speedy trial claim for two reasons. First, it held that rejection of a speedy trial claim could not be appealed before trial, citing *United States* v. *MacDonald*, 435 U.S. 850 (1978), although the double jeopardy claim was appealable under *Abney* v. *United States*, 431 U.S. 651 (1977). Second, it ruled that the speedy trial claim was not properly before

the court because petitioner had based his argument on double jeopardy grounds; it noted that the district court on remand would consider the speedy trial claim if petitioner raised it (Pet. App. 23a-24a).

ARGUMENT

Petitioner contends (Pet. 16-27) that the court of appeals erred in determining that it could not entertain an interlocutory appeal of the district court's decision not to dismiss the indictment on the ground of congruence with the Tennessee indictment that had been dismissed on speedy trial grounds.

1. This contention is not ripe for review. First, as the court of appeals pointed out (Pet. App. 24a), the speedy trial claim was not made in the district court and could not have been considered by the court of appeals. The speedy trial claim will now be considered for the first time by the district court on remand. The district court may find that the challenged portions of the Texas indictment should be dismissed on speedy trial grounds, in which case petitioner would have no reason to appeal.[3] It is inappropriate for this Court (or the court of appeals) to review petitioner's claim at this stage where the speedy trial issue has yet to be considered in the district court. See generally *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. Moreover, the court of appeals was correct in holding (Pet. App. 23a-24a) that an appeal from a failure

[3]The remedy provided by the remand is not illusory. The court of appeals clearly instructed the district court that petitioner's "Sixth Amendment constitutional right to a speedy trial protects him from the government's again bringing those charges contained in the Tennessee indictment which was dismissed with prejudice on constitutional speedy trial grounds" (Pet. App. 22a).

to dismiss an indictment on speedy trial grounds may not be taken before trial. 28 U.S.C. 1291 provides that only final orders may be appealed. *Abney* v. *United States*, 431 U.S. 651 (1977), established that a denial of a double jeopardy claim could be appealed even though such a denial lacks "traditional finality" in that it does not terminate the proceedings. However, in *United States* v. *MacDonald*, 435 U.S. 850 (1977), the Court declined to create a similar exception for speedy trial claims and held that such claims could not be appealed until after trial. The Court noted that "most speedy trial claims * * * are best considered only after the relevant facts have been developed at trial." 435 U.S. at 858.

Although this case differs from *MacDonald* in that part of the speedy trial inquiry would consider factors similar to those considered in a double jeopardy inquiry, other speedy trial issues that are best considered after trial might be raised. In any event, the mere fact that the inquiry is similar to a double jeopardy inquiry does not warrant creating an exception to the normal rule of finality for petitioner's claim. The *Abney* exception was based on "the special considerations permeating [double jeopardy] claims." 431 U.S. at 663. One of the most critical of these "special considerations" is the purpose of the Double Jeopardy Clause to protect defendants from being tried twice, a protection that would be lost if pretrial appeal were not possible. 431 U.S. at 660-662. No similar consideration is involved here. If petitioner is precluded from a pretrial appeal of his speedy trial claim, he will not be tried twice for the same offense because he was never placed in jeopardy on the Tennessee indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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